United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

6415

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 22,974

UNITED STATES

vs.

THOMAS HOWARD ROWEN

Appeal from the United States District Court for the District of Columbia

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TABLE OF CASES

STATUTES AND RULES

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No. 22,974

STATEMENT OF ISSUES PRESENTED

1. Should this case be remanded to the District Court to determine whether the District Court erroneously denied appellant's Motion to Vacate Sentence filed under 28 U.S.C. 2255, since no reasons were given for denying the Motion without a hearing?

2. Should appellant be granted a hearing to determine whether his pleas of guilty to the charges of embezzlement and larceny after trust were made voluntarily with an understanding of the nature of the charges and the consequences of his plea where the transcript of the proceedings shows that Court accepting the pleas, failed to personally address the appellant to make this determination and where the Court further failed to make any inquiry whether there was a factual basis for the plea, in violation of Rule 11 of the Federal Rules of Criminal Procedure?

The Pending case has not previously been before this Court.

Reference to Rulings--Motion to Vacate Sentence page 1--Court Ruling "Denied"

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 22,974

United States of America, Appellee

vs.

Thomas Howard Rowen, Appellant

Appeal from the United States District Court for the District of Columbia

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APPELLANT'S BRIEF

STATEMENT OF CASE

On or about March 5, 1967, appellant was arrested in the District of Columbia on charges of embezzlement and larceny after trust. He was arraigned in the District of Columbia Court of General Sessions and released on bond. A preliminary hearing was scheduled for April 12, 1969, but prior to said preliminary hearing, appellant was arrested at his home in Virginia on a West Virginia warrant charging forgery and uttering. He waived extradition and was returned to West Virginia to face trial, (Motion to Vacate Sentence).

While awaiting trial in West Virginia, and without his knowledge, appellant was indicted in the District of Columbia for embezzlement and larceny after trust (22 D.C. Code 1201; 1203) in a 24 count indictment handed down on August 17, 1967. The District of Columbia indictment charged appellant with embezzlement and larceny after trust from his employer, Raleigh-Haberdasher, Inc., of approximately $200,000.00. The West Virginia indictments referred to above concerned the forgery and uttering of two Raleigh-Haberdasher checks amounting to approximately $106,000.00.

Appellant, after entering a plea of nolo contendere to the West Virginia charges on September 26, 1967, and receiving a sentence of from one to ten years, was removed from

West Virginia on April 29, 1968, on a writ of habeas corpus ad prosequendum to the District of Columbia. On May 3, 1968, appellant was arraigned on the District of Columbia indictment and entered a plea of not guilty to the 24 count indictment. (Criminal File 1046-67).

Appellant's Court-appointed counsel in the trial court filed a motion to dismiss the indictment alleging that appellant had been denied his constitutional right to a speedy trial, which motion was denied by the Court on July 9, 1968.

On September 12, 1968, appellant entered a plea of guilty to counts 1 and 2 of the indictment, but on September 25, 1968, appellant withdrew his plea of guilty to count 1 and instead, entered a plea of guilty to count 4 of the indictment.

On November 8, 1968, appellant was sentenced to a term of three to ten years on count 2, and three to ten years on count 4 to run concurrently, but to begin at the expiration of the West Virginia sentence.

On February 27, 1969, appellant filed a Motion to Vacate Sentence, under 28 U.S.C. 2255, with the U.S. District Court for the District of Columbia which Motion was denied without hearing and without opinion on March 10, 1969. Appellant noted his appeal from the denial of said Motion on March 24, 1969. (Criminal File 1046-67).

ARGUMENT

I. Prisoner in State Custody Can Attack Federal Sentence to Begin at Expiration of State Sentence.

Appellant is presently incarcerated in a West Virginia prison serving a State Court sentence of from one to ten years and upon his release, he must commence a sentence of from three to ten years imposed by the United States District Court for the District of Columbia. Appellant has filed a motion under 28 U.S.C. 2255 seeking to vacate the sentence imposed by the United States District Court for the District of Columbia.

Although presently in a state prison in West Virginia, appellant is "in custody under sentence of a Court established by act of Congress" for the purposes of asserting his attack on the District of Columbia sentence.

In Peyton vs. Rowe, et al., 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968) the Supreme Court held that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of the federal Habeas Corpus Statute. The Court in allowing the respondents in Peyton to attack the sentence not presently being served commented

that if forced to wait until beginning the second sentence, "dimmed memories or death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact," 88 S.Ct. 1549, 1553.

The rationale of Peyton in a habeas corpus case also applies to motions filed under 28 U.S.C. 2255, in that the remedy provided under Section 2255 is intended to be as broad as that provided in a habeas corpus proceeding. United States vs. Hayman, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1952).

In Rollerson vs. United States, 132 U.S. App. D.C. 10, 405 F.2d 1078 (1968), (judgment vacated on other counts 394 U.S. 575, 89 S.Ct. 1300), This Court, in applying the doctrine set forth in Peyton, stated as follows:

> "Appellant sought these extraordinary remedies (coram nobis and Fed. R. Crim. P. 35) because he assumed that relief by habeas corpus or under 28 U.S.C. § 2255 would be unavailable to him since he was not yet serving his sentence under the assertedly improper conviction. After the submission of this appeal, however, the Supreme Court has appeared to remove this disability from an attack by habeas corpus. Peyton vs. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). Accordingly, we treat the proceeding as one initiated under Section 2255." 405 F.2d 1078, 1080.

In the instant case appellant's Motion to Vacate Sentence was denied by the District Court without a hearing or without requiring the United States to respond to the Motion. No reasons were given for the denial and the District Court could very possibly have reached the erroneous conclusion that appellant's Motion to Vacate Sentence was premature in that he was not presently "in custody" under the sentence he was attacking.

Therefore, it is respectfully submitted that the District Court's failure to set forth the reason for denying appellant's Motion requires this Court to remand this case to the District Court with directions to grant appellant a hearing on his Motion to Vacate Sentence, unless the District Court finds that the Motion, files and records of the case conclusively show that appellant is entitled to no relief. Upon remand for a hearing or a clarification of the District Court's ruling, appellant should be permitted to amend his Motion pursuant to Rule 15 of the Federal Rules of Civil Procedure to raise any additional points, including the one considered in Section II of this brief, namely, that the District Court violated Rule 11 of the Federal Rules of Criminal Procedure in accepting his plea of guilty.

II. Plea of Guilty Accepted Without Determining Whether Defendant Understood the Nature of the Charges and the Consequences of the Plea. (See Transcripts of September 12, 1968 and September 25, 1968.)

It is appellant's position that the District Court, in accepting pleas of guilty from appellant clearly violated Rule 11 of the Federal Rules of Criminal Procedure.

The trial Court accepted appellant's pleas of guilty without determining that the pleas were made voluntarily with an understanding of the nature of the charge and the consequences of the plea, and the Court further failed to satisfy itself that there was a factual basis for the plea. This failure on the part of the trial Court amounts to plain error affecting substantial rights of appellant, and, pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure, appellant is now entitled to a hearing to determine if his pleas were made voluntarily.

Rule 11 of the Federal Rules of Criminal Procedure reads as follows:

Rule 11. Pleas

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to

> accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

On September 12, 1968, appellant plead guilty to one count of embezzlement and one count of larceny after trust (counts 1 and 2) involving the same transaction. Shortly thereafter, on September 25, 1968, appellant appeared before the Court and withdrew his plea of guilty to the first count of the indictment and entered a plea of guilty to count 4 of the indictment (involving another transaction) in an apparent effort to remove the inconsistency of pleading guilty to both embezzlement and larceny after trust in regard to the same transaction.

At both hearings, appellant was represented by court-appointed counsel and was questioned, with the exception of one or two questions, by the Deputy Clerk rather than the presiding Judge. The failure of the Judge to personally

address the defendant and personally determine that the plea was being entered voluntarily with an understanding of the nature of the charge and the consequences would clearly require the Court to set aside the guilty pleas had they been made after April 2, 1969, rather than as in the instant case, some eight months earlier. See McCarthy vs. United States 394 U.S. 459, 89 S.Ct. 1166 (1969); Halliday vs. United States 394 U.S. 831, 89 S.Ct. 1498 (1969).

In McCarthy, the Supreme Court in construing Rule 11 of the Federal Rules of Criminal Procedure held that a defendant is entitled to plead anew if the District Court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11. The District Court in McCarthy failed to personally inquire whether the defendant understood the nature of the charge against him and whether he was aware of the consequences of his plea. The Court pointed out that there was an obligation on a judge accepting a guilty plea to personally interrogate the defendant rather than leave this judicial duty up to a courtroom clerk.

In Halliday, supra, the Supreme Court declined to apply McCarthy retroactively and held that only those defendants whose guilty pleas were accepted after April 2, 1969,

are entitled to plead anew if their pleas were accepted without full compliance with Rule 11. However, the Court noted that a defendant may still attack the voluntariness of his plea of guilty where the plea has been accepted without full compliance with Rule 11 and in this regard stated as follows:

> "However, a defendant whose plea has been accepted without full compliance with Rule 11 may still resort to appropriate post-conviction remedies to attack his plea's voluntariness. Thus, if his plea was accepted prior to our decision in McCarthy, he is not without a remedy to correct constitutional defects in his conviction. Cf. Johnson vs. New Jersey, supra, 384 U.S. at 730, 86 S.Ct. at 1779." 89 S.Ct. 1498, 1499.

In the instant case the transcript of the proceedings clearly shows that appellant was not questioned by the Court, nor even by the Deputy Clerk, to determine if he understood the nature of the charges and if there was a factual basis for his plea. Appellant was not advised by the Court or Deputy Clerk of the possible sentence he might face if the plea of guilty was accepted, nor is there anything in the record to indicate that appellant's Court-appointed counsel advised him of the possible sentence he faced or that the District of Columbia sentence might be consecutive to his West Virginia sentence. Furthermore, the transcript of the proceedings

held on September 25, 1968, demonstrates that there was considerable confusion concerning exactly what crime appellant plead guilty to. That portion of the transcript found on page 2 reads as follows:

> THE DEPUTY CLERK: Do you understand that you are entering a plea of guilty to count 4, embezzlement, and did you commit that crime?
>
> DEFT. ROWEN: I did.
>
> THE DEPUTY CLERK: Have you been threatened or coerced by anyone into entering a plea of guilty?
>
> DEFT. ROWEN: I have not.
>
> THE DEPUTY CLERK: Count 4 is larceny after trust, and did you commit that crime?
>
> DEFT ROWEN: Yes.
>
> (Emphasis added) (Transcript--September 25, 1968--page 2.

Also, it is apparent from the transcript at the September 25th hearing that appellant was not advised why it was necessary to change the plea entered on September 12, 1968. The only explanation for this change of plea is as follows:

> MR. REVERCOMB: George H. Revercomb, representing Thomas Howard Rowen in 1046-67.
>
> Several weeks ago Mr. Rowen entered a plea to two counts of a 24-count indictment. It was a technical inadvertent error on my part. I talked to Mr. Wiesman. At this time Mr. Rowen desires to withdraw the plea to the first two counts and enter a plea of guilty to counts 2 and 4.

THE COURT: Why does he want to withdraw the second?

MR. REVERCOMB: Apparently they are inconsistent. He wants to withdraw the first and enter a guilty plea to the fourth. (Transcript--September 25, 1968--pages 1 and 2)

The purpose of Rule 11 is succinctly set forth in McCarthy, supra, as follows:

> " * * * it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas. (Citations omitted)" 89 S.Ct. 1166, 1170.

There is no way of ascertaining from the record in this case whether appellant actually understood the nature of the charges and the consequences of pleading guilty, which is required before a guilty plea can truly be said to be voluntary. By entering a plea of guilty, appellant has waived substantial constitutional rights which must be done in a knowing and voluntary manner. The Supreme Court in McCarthy, supra, emphasised this point as follows:

> "A defendant who enters such a plea simultaneously waives several constitutional

> rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson vs. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." 89 S.Ct. 1166, 1171.

In Durant vs. United States 410 F.2d 689 (1st. Cir., 1969), the Court held that the defendant was entitled to a hearing to determine whether his plea was, in fact, voluntarily made where it appeared that he was not informed that as a consequence of his plea he would be ineligible for parole. On this point the Court stated as follows:

> "We hold that ineligibility for parole is a consequence of a plea of guilty and under Rule 11 the District Court should not have accepted the plea without first informing the defendant that conviction upon the plea would make him ineligible for parole."
> 410 F.2d. 689, 693.

In United States vs. Howard 407 F.2d 1102, (4th Cir., 1969) the Court held that where no attempt was made to determine that the defendant understood the nature of the

charges against him or the possible sentence which might be imposed, the case must be remanded for a hearing to determine if defendant's plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea.

In discussing the duty of a District Judge to make a searching inquiry before accepting a plea of guilty, the Court, in Howard, stated as follows:

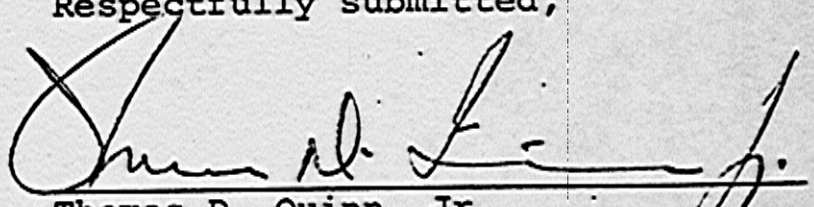
> "Rule 11 requires a district judge to address the defendant personally and determine that 'the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.' Plainly, this language places an exacting duty on the district judge and we think that justice will be best served by a broad interpretation of the Rule's mandate. Before accepting the plea the judge must satisfy himself that it is in fact voluntarily and understandingly made, and ordinarily this entails a searching inquiry into the defendant's motivation in entering the plea. We are in agreement with the Second Circuit's formulation of a district judge's duty under Rule 11. In United States vs. Lester, 247 F.2d 496, 500 (2 Cir. 1957), that Court, speaking through Judge Waterman, stated:
>
> 'It is the duty of a federal judge before accepting a plea of guilty to thoroughly investigate the circumstances under which it is made. (Citations omitted) Even when the defendant is represented by counsel it has been held that the mere statement of the accused that he understands the charge against him does not relieve the court of the responsibility of further inquiry * * * Such a determination may be made only by a penetrating and comprehensive examination of all the circumstances under which the plea is made ' ". 407 F.2d 1102, 1104.

The failure of the District Court in the instant case to make a searching inquiry to determine that the plea was voluntarily made with an understanding of the nature of the charges and the consequences of the plea is clearly erroneous, and constitutes "plain error" which may be noticed by this Court although it was not raised in appellant's Motion to Vacate Sentence, and the case should be remanded to the District Court with directions that a hearing be granted appellant.

CONCLUSION

WHEREFORE, for the foregoing reasons appellant respectfully requests the Court to remand this matter to the District Court with directions to allow appellant to make appropriate amendments to his motion and to grant appellant a hearing thereon, unless the District Court finds that the motion, files and records of the case conclusively show that appellant is entitled to no relief.

Respectfully submitted,



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